Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
800 Data Base Access Tariffs and the 800 Service Management System Tariff	)	CC Docket No. 93-129
	)	
and	)	
	)	
Provision of 800 Services	)	CC Docket No. 86-10

REPLY OF U S WEST COMMUNICATIONS, INC. TO OPPOSITIONS TO APPLICATION FOR REVIEW

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U S WEST Communications, Inc. ("U S WEST") submits this Reply to the Oppositions of AT&T Corp. ("AT&T") and MCI Telecommunications Corporation ("MCI") to U S WEST's Application for Review ("Application") of the Refund Order issued by the Common Carrier Bureau ("Bureau") in this proceeding.[1] Neither AT&T, nor MCI has provided any reason to deny U S WEST's Application.

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[1] In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, CC Docket Nos. 93-129 and 86-10, Memorandum Opinion and Order, DA 97-1336, rel. June 26, 1997 ("Refund Order"). U S WEST's Application for Review, filed July 28, 1997. AT&T's Opposition filed August 12, 1997. This filing replaces and supersedes the Reply filed by U S WEST on August 27, 1997. U S WEST submitted that filing in accordance with the Commission's rules. The Commission subsequently issued a Public Notice establishing a briefing schedule, and MCI submitted its Opposition in accordance with that schedule (AT&T resubmitted its Opposition, which had also been filed in accordance with the generally-applicable rules). MCI Opposition filed Sep. 8, 1997. This Reply responds to both Oppositions. Public Notice, Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, Report No. 2217, Corrected Aug. 21, 1997.

I. INTRODUCTION AND SUMMARY

In its Application, U S WEST established that, because of the effects of the price cap sharing mechanism, a further refund at this point would have the effect of requiring U S WEST to refund the same revenues twice with respect to 1993 and 1996. AT&T and MCI dispute this. They raise a variety of claims, most of them responsive to arguments U S WEST did not make. Thus they argue that sharing and refunds arise from different causes and are implemented by different mechanisms, or that U S WEST cannot logically be entitled to both a headroom "offset" and a sharing offset. Nowhere, however, do they refute (though MCI makes an unsuccessful attempt) U S WEST's fundamental claim: that its overstated Price Cap Index ("PCI") caused it to have a greater sharing obligation, dollar-for-dollar in 1996, and fifty cents on the dollar in 1993.

Neither party makes much of an effort to refute U S WEST's second argument, that the Federal Communications Commission's ("Commission") undisputed failure to complete its investigation in the time required by the Communications Act prejudiced U S WEST as to 1996. AT&T dismisses U S WEST's position, incorrectly characterizing it as a non-legal argument. Without addressing U S WEST's showing, MCI simply claims that U S WEST suffered no prejudice. MCI would also have the Commission avoid the issue on procedural grounds.

We will demonstrate in this Reply that neither AT&T, nor MCI, has provided any reason to deny U S WEST's Application.

II. AT&T AND MCI HAVE NOT REFUTED U S WEST'S SHOWING THAT ORDERING A REFUND WILL REQUIRE U S WEST TO REFUND THE SAME AMOUNTS TWICE

In its Application, U S WEST established that it had refunded, via the price cap sharing mechanism, half of its refund liability for 1993 and all of that liability for 1996. That is, every dollar of revenue generated by the costs the Commission disallowed in the Report and Order[2] produced a dollar of sharing liability in 1996 and fifty cents of sharing liability in 1993. Based on this fact, which even the Refund Order acknowledged,[3] U S WEST argued that disregarding the amounts already refunded via sharing would require U S WEST to refund the same amounts twice.

MCI disputes this,[4] claiming U S WEST has overstated the amount of its sharing refund attributable to its overstated traffic sensitive PCI because sharing amounts are apportioned among all baskets. But the portion of U S WEST's sharing refund apportioned to the traffic sensitive basket greatly exceeded U S WEST's refund liability for the two years in question here. In 1993, U S WEST's sharing refund included over $2.2 million apportioned to the traffic sensitive basket; its refund liability for 1993 was about $418,000. In 1996, U S WEST's sharing refund included $11 million apportioned to the traffic sensitive

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[2] In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, Report and Order, 11 FCC Rcd. 15227 (1996) ("Report and Order").

[3] Refund Order ¶ 17.

[4] MCI at 7-8.

basket; its refund liability for 1996 was less than $5.4 million.[5] In any case, the apportionment of sharing liability among the various price cap baskets is of no consequence here: a refund dollar apportioned to one basket costs U S WEST the same as a refund dollar apportioned to another basket. MCI's claims do not address the fundamental point here: U S WEST's overstated PCI caused it to have a greater refund liability in the years in questions; requiring it to refund those same amounts again amounts to a double refund.

AT&T and MCI never directly address U S WEST's arguments, preferring instead to raise the differences in sharing and PCI adjustments:

> [A] [local exchange carrier] LEC's sharing obligation does not mean that [the] LEC . . . has made a refund to its customers for any overstated PCI. To the contrary, because the price cap plan stresses LEC overall productivity, the sharing obligation is measured by total interstate earnings and thus can be triggered even if the LEC does not exceed its PCIs for any of the measured services.[6]

AT&T has it exactly backwards. U S WEST did not claim that the presence of a sharing obligation necessarily indicates that a LEC has exceeded its PCIs. But U S WEST's overstated PCI undeniably increased its sharing obligation. And if U S WEST is required to refund the overcharges and make a sharing refund, it has refunded the same amounts twice.

Moreover, AT&T tells us --

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[5] See U S WEST's Transmittal No. 847, filed June 16, 1997, Description and Justification, Section 1, Workpaper 6 and TRP EXG-1, Col. J, Line 360. See Errata to 1994 Annual Access Charge Tariff Filing, Transmittal No. 472, filed Apr. 22, 1994, TRP Form EXG-1 at Page 2.2 of 4 and Description and Justification Section 1, Workpaper 3A, Line 14.

[6] AT&T at 4-5 (emphasis in original, footnotes omitted). See MCI at 6-8.

> to the extent that a sharing obligation was triggered for U S WEST, the direct link to its 800 data base revenues is tenuous at best. In fact, U S WEST did not demonstrate . . . that any sharing obligation resulted from its 800 data base rates or any particular rate element.[7]

Totally true; utterly irrelevant. The Commission did not order U S WEST to refund any portion of its 800 data base revenues "or any particular rate element." In the Report and Order, the Commission ordered U S WEST to adjust its PCIs and, if necessary, reduce rates to bring its Actual Price Index ("API") back to the level of the adjusted PCI. U S WEST adjusted its PCI and brought its API back within limits by reducing its rate for local switching; its rates for 800 data base service have not changed. The Commission subsequently ordered U S WEST to make refunds, but those refunds are again measured by the difference between its PCI and API in any given year.[8] In short, this proceeding is not about "any particular rate element," and never has been. It concerns U S WEST's PCI and the relationship between that PCI and its API. That U S WEST cannot attribute its increased sharing obligation to "any particular rate element" is irrelevant.

What U S WEST has demonstrated is that its overstated PCI increased its sharing obligation. If U S WEST's PCI had been at the level the Commission subsequently found appropriate, U S WEST would not have collected the revenues that now constitute the refund. U S WEST would also not have returned those revenues to carriers through the sharing mechanism -- dollar-for-dollar in 1996, and fifty cents on the dollar in 1993. Nothing in AT&T's Opposition rebuts, or even

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[7] Id. at 5.

[8] Refund Order ¶¶ 11-13.

challenges, that fundamental truth.

AT&T challenges U S WEST's argument that, having allowed a "headroom offset" (as AT&T characterizes it), the Commission should also allow a sharing offset. Thus, says AT&T, "if U S WEST is entitled to one offset, it cannot logically be entitled to the other."[9] There was, of course, no "headroom offset." Rather, the Bureau correctly determined to measure the LECs' refund liability as the amount by which their APIs exceeded their revised PCIs in any year. That is not an "offset" to an otherwise-measured liability.

Moreover, though it claims that U S WEST "cannot logically be entitled" to a sharing offset if it receives a headroom "offset," AT&T makes no cogent argument to support that claim. AT&T states:

> The headroom offset is based on U S WEST not overcharging its customers, because it priced its service below the Price Cap Index. The offset thus represents the amount U S WEST did not charge and collect from its customers. The sharing obligation, on the other hand, arises from actual overearnings based on the amounts actually charged and collected from customers. Because the sharing obligation arises from actual overearnings, the Bureau's Refund Order properly denied an offset for sharing.[10]

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[9] AT&T at 8, n.18. AT&T also rebuts a supposed argument that the Refund Order is inconsistent with Section 204 of the Act "by virtue of the 42 month delay in deciding the rate investigation." (Id. at 8.) AT&T has confused two separate arguments here. U S WEST merely noted that Section 204 requires a carrier to refund only the portion of charges found to be unlawful. Because the Refund Order has the effect of requiring U S WEST to refund that "portion" twice, we believe it is inconsistent with Section 204. U S WEST made a separate argument regarding the Commission's failure to complete its investigation within the statutory time limit. We discuss that infra.

[10] Id. at 8, n.18 (emphasis in original).

AT&T has posed a non sequiter. Though this statement may accurately describe the headroom and sharing "offsets" in some vague sense, the stated conclusion does not follow.

The argument AT&T is attempting to respond to here was somewhat less convoluted than AT&T's response would indicate. In the Refund Order, the Bureau properly allowed the LECs to measure their refund liability in any year as the amount by which their APIs exceeded their recalculated PCIs. As U S WEST noted, the Bureau thus acknowledged the practical realities of price caps. We simply argued that the Bureau acted inconsistently in disregarding the effects of sharing, another practical reality of the price cap regime. That one effect arises from undercharging customers, while the other results from overearnings, does not justify ignoring the latter. At the very least, AT&T has not provided any reason for doing so.

AT&T and MCI[11] chide U S WEST for misstating the principle of FPC v. Tennessee Gas Co.,[12] the case principally relied on by the Bureau in rejecting a sharing offset. U S WEST stated that the principle of that case "is simply that a utility may not recoup undercharges to one set of customers by overcharging another group of customers."[13] To be sure, there was much more to FPC v. Tennessee Gas Co. than that simple proposition, but it is unquestionably at the heart of the ruling:

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[11] Id. at 6-8; MCI at 9-10.

[12] Federal Power Com'n v. Tenn. Gas Transmission Co., 371 U.S. 145 (1962).

[13] Application at 8.

> [A] rate for one class or zone of customers may be found by the Commission to be too low, but the company cannot recoup its losses by making retroactive the higher rate subsequently allowed; on the other hand, when another class or zone of customers is found to be subjected to excessive rates and a lower rate is ordered, the company must make refunds to them. The company's losses in the first instance do not justify its illegal gain in the latter.[14]

This is the risk that Tennessee Gas "shouldered" when it filed its rate case. The risk arose from the fact that the Federal Power Commission ("FPC") would allocate its costs among the company's six rate zones. The current proceeding presents nothing comparable to that.

The point, though, is that nothing in FPC v. Tennessee Gas Co. obliges a regulated company to bear the risk of twice refunding the same amounts to the same customers. The case is fundamentally irrelevant to resolving the issue of a sharing offset, and the Bureau erred in relying on it.

MCI argues that U S WEST is attempting to offset its refund liability by the amount of its undercharges to other customers.[15] This is so, we are told, because the overcharges were paid by traffic sensitive customers, while the sharing refund was spread among the customers of all baskets. But the Bureau's method of paying the refund -- a one-time PCI reduction -- effectively disconnects the refund from the customers who might have paid the overcharges that gave rise to it. Customers who paid the overcharges, but who are no longer in business, will receive no benefit; customers who came into existence after the overcharges were paid will receive the benefit of the reduction even though they paid no portion of the overcharges;

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[14] FPC v. Tennessee Gas Co., 371 U.S. at 152-53.

customers whose relative usage of the services in the traffic sensitive basket has changed will benefit from the "refund" disproportionately to the amount they were overcharged. Indeed, because the Commission never determined that any specific rate was unlawful, there is no means of determining what customers were overcharged for what services; similarly, because the ordered "refund" simply reduced U S WEST's PCI (which was also reduced by the price cap mechanisms), there is no means of determining what customers will benefit from the "refund" (as opposed to the benefits attained from the operation of price caps).[16]

III. AT&T AND MCI HAVE NOT REFUTED U S WEST'S SHOWING THAT IT HAS BEEN PREJUDICED BY THE COMMISSION'S FAILURE TO COMPLETE THIS PROCEEDING WITHIN THE PERIOD PERMITTED BY THE COMMUNICATIONS ACT

U S WEST's Application demonstrated, as to 1996 only, that the Commission's failure to complete its investigation of the rates at issue within the time limit then prescribed by the Communications Act had prejudiced U S WEST. If the Commission had met its statutory obligation, U S WEST's PCIs would have been adjusted in 1994 in the same fashion that the Commission ordered in late 1996. That adjustment would obviously have eliminated the need for any refunds with respect to 1996. But that adjustment would also have reduced U S WEST's earnings -- and thus its sharing obligation -- in 1996. Thus, because the

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[15] MCI at 10.

[16] MCI also argues that U S WEST is attempting to engage in retroactive ratemaking by seeking a sharing offset. Id. at 9-10. This, of course, turns the matter on its head. The "refund" here affects prospective rates; it has no effect on any rate U S WEST charged in the past. MCI would have the Commission rule that

Commission failed to complete its investigation within the time period mandated by Congress, U S WEST incurred an increased sharing obligation in 1996 -- an obligation that bears a direct, dollar-for-dollar relationship to the revenues derived from the subsequently-disallowed costs. Now, the Refund Order would require U S WEST to refund these same amounts a second time. The Commission's inaction thus has plainly prejudiced U S WEST, and it cannot now order refunds with respect to 1996.

AT&T makes little effort to rebut U S WEST's argument, stating --

> U S WEST has offered no argument or evidence to show that the Bureau's consideration of [these] two actions would have resulted in a different result if a decision had been released sooner.[17]

AT&T is correct. Indeed, if the Commission had met its statutory obligation, the Bureau would not have had the "two actions" to consider for 1996. And that, of course, is the very point of the argument. If the Commission had completed its investigation in a timely fashion, the matter would have been resolved long before the 1996 rates took effect. In that case, U S WEST's 1996 rates would not have given rise to a refund obligation and its sharing obligation for that year would likewise have been lower.

By failing to meet its statutory obligation, the Commission caused U S WEST to have increased sharing for 1996. Now to require U S WEST to implement refunds of the same amounts essentially to the same customers would prejudice

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a LEC has no recourse when it has been ordered to refund too great an amount to its customers.

[17] AT&T at 9-10.

U S WEST.[18] That is precisely what Kelly,[19] Baumgardner[20] and the other cases cited by U S WEST[21] condemn.[22]

MCI claims the Commission should not consider U S WEST's argument, either because the Commission already rejected it in the Reconsideration Order,[23] or because the argument was not presented to the Bureau.[24] MCI is wrong on both counts. In the Reconsideration Order,[25] the Commission considered and rejected three arguments based on its failure to issue an order within the statutory time limit:

- that the Commission was thereby deprived of authority to order any refunds;[26]
- that it equitably should not order refunds because the proceeding had dragged on too long;[27] and

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[18] Thus MCI is simply wrong in claiming that U S WEST suffered no prejudice from the delay in completing the investigation. MCI at 11.

[19] Kelly v. Secretary, U.S. Dept. of Housing, 97 F.3d 118 (6th Cir. 1996); Kelly v. Secretary, HUD, 3 F.3d 951 (6th Cir. 1993).

[20] Baumgardner v. Secretary, HUD on Behalf of Holley, 960 F.2d 572 (6th Cir. 1992).

[21] Application at 11, n. 26.

[22] AT&T makes the curious claim that this argument represents U S WEST's "apparent acknowledgment that there is no legal basis for challenging the Bureau's decision." (AT&T at 9.) Lest there be any mistake, this argument is very much a "legal basis" for reversing the Refund Order.

[23] MCI at 11.

[24] Id. at 11-12.

[25] In the Matter of 800 Data Base Access Tariffs and the 800 Service Management System Tariff and Provision of 800 Services, Order on Reconsideration, 12 FCC Rcd. 5188 (1997) ("Reconsideration Order").

[26] Id. ¶ 15.

[27] Id. ¶ 16.

- that the LECs were prejudiced by the delay because they could have raised rates in other baskets.[28]

The Commission did not consider whether the delay would prejudice the LECs by requiring them to make a double refund if their sharing refunds were not accounted for.

MCI is also incorrect in stating that this issue was not before the Bureau. In its Comments on the Petitions for Reconsideration filed by AT&T and MCI, U S WEST argued that it should have no refund liability beyond 1993 because, if the Commission had completed its investigation within the statutory time limit, U S WEST would have had no refund liability after 1993.[29] U S WEST also argued that its overstated PCI might increase its sharing obligation for 1996.[30] The Commission did not address that argument in the Reconsideration Order.

More specifically, in its Reply to the Comments on its Refund Plan, U S WEST argued that it had refunded a portion of its refund liability through the sharing mechanism, so that not recognizing a sharing offset would amount to a double recovery by the LECs' customers.[31] U S WEST than noted that, because the Commission had not completed its investigation in the time specified by the statute, it should not punish the LECs by effectively requiring a double refund. That, of

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[28] Id. ¶ 17.

[29] Comments of U S WEST, filed herein Dec. 11, 1996 at 2-3 (commenting on the Nov. 27, 1996 Petitions for Reconsideration filed by AT&T and MCI).

[30] Because that filing was made prior to the end of 1996, U S WEST did not then know the extent of its sharing liability for 1996.

[31] Reply Comments of U S WEST, filed herein June 13, 1997 at 5 and n. 17.

course, is essentially U S WEST's argument here: that, as to 1996, the Commission's failure to meet the statutory timeframe produced both an increased sharing obligation and a refund liability, thus prejudicing U S WEST by requiring it to refund the same amounts twice. The issue of the Commission's failure to conclude this proceeding within the time limits specified by the statute was thus squarely before the Bureau.

IV. CONCLUSION

AT&T and MCI have provided no valid reason to deny U S WEST's Application. That Application demonstrates that requiring a refund will force U S WEST to refund the same amounts to the same customers twice. Nothing in AT&T's and MCI's Oppositions refutes that fundamental fact. The Commission should reverse the Refund Order and allow U S WEST to offset its refund liability to reflect the amounts it has already returned to customers via sharing. In the alternative, because of its failure to complete its investigation in the time prescribed by the Act, the Commission must allow U S WEST to offset its 1996 refund liability to reflect its sharing refund for that year.

Respectfully submitted,

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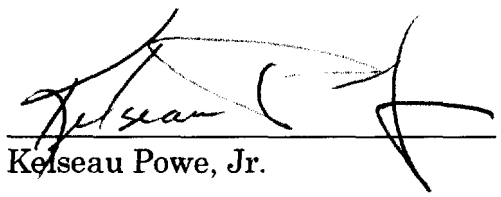
CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 23rd day of September, 1997, I have caused a copy of the foregoing **REPLY OF U S WEST COMMUNICATIONS, INC. TO OPPOSITIONS TO APPLICATION FOR REVIEW** to be served via first-class United States Mail, postage-prepaid, upon the persons listed on the attached service list.



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